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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1977

No. 76-2373

NATIONAL BERYLLIA CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
TWENTY-SECOND REGION

NATIONAL BERYLLIA CORPORATION,
Employer,
and

LOCAL 177, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner.

Case No. 22-RC-6172

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Decision and Direction of Election issued in this matter on November 15, 1974[1] an election by secret ballot was conducted on December 11, 1974, under the direction and supervision of the undersigned in a unit found appropriate for collective bargaining.[2] Thereafter, a tally of ballots was duly served upon the parties showing that of

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[1] Regional Decision #55-74 (unpublished).

[2] The unit appears as follows:

> All production and maintenance employees, including production control employees, employed by the Employer at its Haskell, New Jersey location, excluding all office clerical employees, professional employees, (including engineers), technicians, guards and supervisors, as defined in the Act.

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approximately 125 eligible voters,[3] 115 cast valid ballots, of which 72 were cast for the Petitioner, 1 was cast for the Intervenor,[4] 42 were cast against the participating labor organizations and 7 ballots were challenged, which were not determinative, resulting in a majority of the valid votes counted being cast for the Petitioner.

Pursuant to Section 3(b) of the National Labor Relations Act as amended, the Board has delegated its powers in connection with this proceeding to the undersigned Regional Director.

Thereafter, the Employer anl Intervenor[5] timely filed objections to conduct affecting the results of the election as follows:

EMPLOYER'S OBJECTIONS:

1. In violation of the National Labor Relations Act, as amended ("NLRA"), and several months prior to the election Local 177 promised employees within the bargaining unit to waive initiation fees if, prior to the election, they signed authorization cards for Local 177 and/or become part of a newly formed group of employees who supported Local 177 in its efforts to organize National. Said promise was repeated in writing to this group of employees on or about the day of the election.

[3] It is noted that the tally of ballots herein inadvertently indicated the approximate number of eligible voters as 125, whereas the correct figure is 145. I find it unnecessary, however, to issue a revised tally of ballots as this error has no material effect with respect to the outcome of the election herein.

[4] International Association of Machinists and Aerospace Workers, District 15, AFL-CIO.

[5] By letter dated February 4, 1975, the Intervenor withdrew its objections.

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2. In violation of the NLRA, the promise referred to in paragraph 1 as to waiver of initiation fees was made prior to the election and on the day of the election to all employees who voted.

3. On the day of the election and prior thereto Local 177 made statements to the employees, including a written mailing reaching the employees at their homes only a day or two before the election, seriously misrepresenting facts relating to National and its employees. These false and deceptive claims, designed deliberately to influence the voting in favor of Local 177, included the following:

(a) That National instituted wage reductions for "most employees";

(b) That those eligible to vote included terminated employees and that otherwise their names "would not have been placed on the eligibility list sent out by the National Labor Relations Board . . ."

(c) That such and other claims had been "verified by our attorneys".

Because these misrepresentations did not come to the attention of National until too late for National to respond within the time allowed by law, they constitute coersion (sic) of the employees in violation of the NLRA, and an unfair labor practice.

4. Local 177 through its representative improperly electioneered at, in and around the polling place immediately preceding and during the election in violation of the NLRA, fatally prejudicing the election in favor of Local 177 and to the harm of National and its employees.

5. On or about December 10, 1974, and within 24 hours of the election, the General Organizer of Local 177 in a mass meeting of the employees called by Local 177 denied that he had lost his election in the Union to remain as General Organizer, deceiving the employees in causing them to believe he would represent them in any future negotiations with National and that the union membership was in favor of retaining him as General Organizer.

At this meeting misrepresentations reinforced subsequently by letter were made to the employees without the opportunity for National to respond and in violation of the NLRA.

6. The Board instructed National to post a defective Notice of Election, which Notice National duly posted, and which Notice the Board subsequently ordered National to remove and replace with an amended Notice, causing the status quo to be affected adversely to National in that National was forced to explain the error to the employees and therefore indirectly and implicitly assume responsibility for the error.

By the above and other actions preceding and during the election the Board and Local 177 caused great harm and prejudice to National and its employees, all in violation of the NLRA.

For these and other reasons National hereby requests that the results of the election be set aside.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned has caused an investigation of the objections to be made, during which all parties were afforded full opportunity to submit

evidence bearing on the issues involved. The undersigned has considered the objections, and, on the basis of the evidence adduced in the investigation, including the evidence submitted by the parties, finds as follows:

OBJECTION NOS. 1 AND 2:

As these objections are related, they will be considered together. The Employer asserts herein that the Petitioner made unlawful promises of benefit by offering, in writing and orally, a waiver of initiation fees to induce employees to support Petitioner by signing authorization cards and voting for Petitioner.

In support of its objections, the Employer submitted a three-page leaflet (herein attached as Exhibit A), distributed by the Petitioner to unit employees, which stated in pertinent part: "REMEMBER-THERE IS ABSOLUTELY NO INITIATION FEE—EVEN IF YOU ARE NOW LAID-OFF, AS YOU ARE STILL CONSIDERED PART OF A NEWLY FORMED GROUP." The investigation disclosed that this leaflet was mailed by Petitioner to unit employees on or about December 6, 1974, and received by them during the week of the election[6], and that it was posted on at least one bulletin board in the Employer's plant on or about December 10, 1974.[7]

In further support of its objections, the Employer proffered two employee witnesses, one of whom initially stated, in an affidavit supplied by the Employer that at several meetings conducted by Petitioner prior to the election Petitioner's Recording Secretary, Primo Benale, allegedly stated, *inter alia*, "if we signed an authorization card for

[6] The election herein was conducted on December 11, 1974.

[7] There is no evidence that Petitioner was responsible for said posting.

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Local 177 before the election and/or became part of a newly formed group of new employees who supported Local 177 in its efforts to organize the employees of National, we would not have to pay the $100-$150 individual initial fee for Local 177". The second employee witness proffered by the Employer stated, in an affidavit supplied by the Employer, that at a mass meeting of employees conducted by Petioner in August 1974, Benale stated, *inter alia* "that as part of a newly formed group of employees who supported Local 177 in its efforts to organize the National employees I would not have to pay the $100-$150 initiation fee at Local 177", and "that all those who signed cards before the election would become part of a new or charter group, and could become a member of Local 177 without having to pay the initiation fee." Both employee witnesses stated that the promise to waive initiation fees was repeated at several subsequent meetings conducted by Petitioner.[8]

During the course of the investigation, both employee witnesses proffered by the Employer were reinterviewed by an investigating Board agent. The first employee wit-

[8] It is uncontradicted that the Petitioner conducted four Union campaign meetings (August 15, 1974, September 17, 1974, December 3, 1974 and December 10, 1974) prior to the election herein, which were each attended by approximately 40-60 employees. Primo Benale was the only representative of Petitioner present at these meetings which took place at a local tavern near the Employer's premises. It is noted that the first meeting, August 15, 1974, occurred prior to the filing of the petition in this matter on August 16, 1974. It is well settled that the Board will not consider election objections based upon interference which occurred outside the "critical period" which begins with the filing of a petition and ends with the election. *Goodyear Tire and Rubber Company*, 139 NLRB 453. In the instant case, statements allegedly made at the first meeting were later repeated at subsequent meetings and accordingly are noted herein for the purpose of establishing a complete context.

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ness stated, in a supplemental affidavit that his earlier affidavit, prepared by the Employer, was in "error" regarding the matter of the waiver of initiation fees, and in this connection Benale, at the September 1974 meeting, the first meeting which this employee attended, allegedly said," . . . any employee at National even if laid-off would not have to pay initiation fees", and ". . . new employees hired after a contract was signed with National would have to pay initiation fees of $100 to $150". This employee witness further stated that Benale, at no time offered a waiver of initiation fees contingent upon signing an authorization card or supporting Petitioner in the election. In addition, he stated, in his supplemental affidavit, that Benale said ". . . employees of National, being a newly formed group would have initation fees waived", and "New employees hired after a contract would have to pay initiation fees". This employee attended Petitioner's subsequent two meetings and stated that Benale's statements regarding waiver of initiation fees did not vary.

With regard to the second witness proffered by the Employer,[9] in her supplemental affidavit stated, *inter alia*, that Benale said at the August 15, 1974 meeting ". . . that once the company was organized and a contract had been signed then all new employees and any new union members would have to pay initiation fees." She further stated, in her supplemental affidavit, that she did not recall Benale "saying anything to the effect that in exchange for signing a union card or supporting Local 177, initiation fees would be waived," and that "He never said anything like that." In explaining the apparent contradiction between her two

[9] This employee witness attended all four meetings conducted by Petitioner.

statements, the initial statement supplied and prepared by the Employer and her supplemental affidavit, given to an investigating Board Agent, she stated that the statements attributed to Benale contained in the affidavit prepared by the Employer "refer to my interpretation of Benale's statements and not his actual statements," and "His actual statements are as described herein above in this statement." [10]

Benale, in an affidavit, stated that it is the Petitioner's policy to waive initiation fees for all employees during an organizational drive and that this waiver is not contingent upon signing authorization cards or supporting Petitioner. Benale further stated that, at meetings referred to heretofore, he told employees, *inter alia,* that "Nobody pays initiation fees, they are waived up until the time we have a contract," and "Any new employee that is hired after we have a contract with the Company will have to pay intiation fees."

In this connection, random interviews of unit employees who attended Petitioner's meetings, corroborated Benale in all material respects. Upon examination, it is clear, and I so find, that the statements attributed to Benale in the supplemental affidavits of the two employee witnesses proffered by the Employer, as described above, are strikingly similar to Benale's version.[11]

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[10] This statement refers to her supplemental affidavit.

[11] As the supplemental affidavits of the two witnesses proffered by the Employer do not contradict Benale's statements, and noting that there is independent corroboration by other unit employees, I find that the initial affidavits submitted by the Employer, as heretofore described, do not raise any material issue regarding credibility with respect to oral statements attributed to Petitioner.

The Supreme Court in *N.L.R.B.* v. *Savair Manufacturing Company,*[12] held that a union's offer to waive initiation fees for employees who sign union authorization cards before a Board conducted representation election, interferes with employees' free choice in the election. In addition, the Court characterized the waiver of initiation fees as a legitimate interest of the union in eliminating an "artificial obstacle," for example, the expense of representation, from the employees' free choice in the election. This union interest "can be preserved as well by waiver of initiation fees available not only to those who have signed up with the union before an election but also to those who join after the election." The availability of this waiver to all employees eligible to vote in the election, whether they should join the Petitioner before or after the election, ensures that the waiver has not been conditioned upon support of the union in any form. The absence of such conditions avoids the creation of any impression that employees who refrain from supporting the Petitioner would be penalized therefor in comparison with those employees who support the Petitioner during the electoral campaign.[13]

The Employer contends that the phrase "newly formed group" as utilized in Petitioner's leaflet (Exhibit A) and verbally, as heretofore described (". . . employees of National, being a newly formed group would have initiation fees waived"), created sufficient ambiguity so that employees could reasonably conclude that the waiver would be conditioned on their joining or supporting Petitioner prior

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[12] 414 U.S. 270, 84 LRRM 2929 (1973).

[13] *N.L.R.B.* v. *Savair Manufacturing Company, supra; Con-Pac, Inc.,* 210 NLRB No. 70 [supplementing 207 NLRB No. 105]; *Endless Mold, Inc.,* 210 NLRB No. 34.

to the election. In *Inland Shoe Manufacturing Co., Inc.*,[14] a union promised in a leaflet distributed to employees that "There are no initiation fees for charter members of a new local (and that is what you would be)[.]" The Board concluded that Petitioner's offer to "charter members" was ambiguous and subject to various interpretations and was the kind of pre-election offer of waiver of initiation fees condemned by the Supreme Court in *Savair*. In this connection, the Board further concluded that employees could well have been induced to become early card signers on the reasonable belief that only thereby could they be "charter members" eligible for a waiver of initiation fees. Furthermore, in the circumstances therein, the Board found that it was unclear from the leaflet when employees must join the union to be eligible for the waiver and that the term "charter member" itself connotes that an employee need be a member before he can become a "charter member." In addition, the Board noted that part of the thrust of the union's leaflet was to urge employees to sign cards at once. However, the Board, in *GTE Lenkurt, Incorporated*[15] held that the use of the term "charter member" did not create ambiguity in which employees could reasonably conclude that the waiver would be conditioned on their joining the union prior to the election, when that term was viewed in the totality of circumstances existing therein, particularly the clear and repeated expressions of union policy throughout the election.[16]

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[14] 211 NLRB No. 73. See also *The Coleman Co., Inc.*, 212 NLRB No. 129 for a similiar analysis.

[15] 215 NLRB No. 53 (supplementing 209 NLRB No. 91).

[16] *Smith Company of California, Inc.*, 215 NLRB No. 97; *Western Refrigerator Co., Subsidiary of The Hobart Manufacturing Co.*, 213 NLRB No. 40.

The waiver, in the instant case, made by Petitioner in its leaflet and orally was, and I so find, available to all voters in the election. As the evidence adduced during the investigation disclosed, the waiver herein was not conditioned upon the expression of support for Petitioner in any form during the electoral campaign. In this regard, the Employer's witnesses, as described heretofore, stated, *inter alia*, that the Petitioner promised "any employee at National even if laid off would not have to pay initiation fees" —"employees of National, being a newly formed group would have initiation fees waived"—"that once the Company was organized and a contract had been signed, then all new employees and any new union members would have to pay initiation fees." Furthermore, the investigation revealed that the Petitioner had an established policy of waiving initiation fees for all employees during organizational campaigns regardless of whether they supported the Petitioner, and so advised employees of the Employer herein. In addition, I find that Petitioner's leaflet is devoid of urgings to employees to sign authorization cards.[17] Based upon the totality of circumstances existing herein, I find that the term "newly formed group," in Petitioner's leaflet and statements could only be interpreted by the employees to include all present employees who joined the Petitioner at least up to the time a collective bargaining agreement existed. In this connection, it is clear that the Petitioner, on a number of occasions, told employees that the waiver would apply until a "contract had been signed." Clearly, in these circumstances, the waiver was made available to

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[17] Cf. *Inland Shoe Manufacturing Co., Inc., supra.*

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all employees, not only before but subsequent to the election, since the Petitioner had to be certified as the bargaining representative before a contract could be negotiated and signed. In addition, I find that the term "newly formed group" unlike "charter member" does not inherently connote a requirement that the employee first join or support Petitioner in order to benefit from the waiver.[18] After carefully examining Petitioner's leaflet and oral statements, I find that they do not contain the elements of interference that the Supreme Court focused on in *Savair*.[19]

Based on the foregoing,[20] I find that Employer's Objection Nos. 1 and 2 raise no substantial or material issues with respect to conduct affecting the results of the election. Accordingly, Objection Nos. 1 and 2 are overruled.

OBJECTION No. 3

The Employer contends herein that the Petitioner, by oral and written statements, made material misrepresentations of fact to all eligible voters, to which the Employer did not have an opportunity to respond, thereby warranting that the election be set aside. In particular, the Employer alleges that Petitioner's leaflet (Exhibit A) materially mis-

[18] Webster's International Dictionary, 2nd Edition, defines group as "an assemblage of persons or things regarded as a unit."

[19] *N.L.R.B.* v. *Savair Manufacturing Company, supra; Smith Company of California, Inc., supra; Western Refrigerator Co., Subsidiary of The Hobart Manufacturing Co., supra; GTE Lenkurt, Incorporated, supra; Endless Mold, Inc., supra; Con-Pac, Inc., supra;* see also Cf. *Inland Shoe Manufacturing Co., Inc., supra;* Cf. *The Coleman Co., Inc., supra.*

[20] Contrary to the Employer, I find that the additional fact that the timing of Petitioner's leaflet and oral waiver occurred shortly before the election herein is not material, as I have found the waiver itself not to be objectionable.

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represented: (1) a previous action by the Employer regarding wages by stating, *inter alia*, that in August, 1974 "most employees took a 'wage-cut' "[21] and (2) the eligibility of certain allegedly terminated employees by stating in pertinent part:

ARE YOU ELIGIBLE TO VOTE?

YES

> or your name would not have been placed on the eligibility list sent out by the N.L.R.B. and you would not be receiving this letter. . . .

Furthermore, the Employer contends that Petitioner's leaflet was false and misleading when it stated at the bottom of page 1, in bold print, "THIS IS ALSO VERIFIED BY OUR ATTORNEYS," thereby giving the entire leaflet credence. In addition, the Employer contends that the Petitioner, at union campaign meetings,[22] made material misrepresentations in statements to employees to the effect that (1) the Employer had spent thousands of dollars in attorney fees to prevent Petitioner from being certified by the Board and (2) the Petitioner had not assessed its members to support sympathy strikes including the then current United Parcel Service strike in New York.

[21] Subsequent to the investigation conducted herein, the Employer, on March, 1975, submitted a letter dated November 29, 1974 (herein attached as Exhibit B), purportedly mailed to unit employees by the Petitioner which states in pertinent part: "Just keep in mind the wage cuts that most of the employees were forced to take back in the early part of August. . . ." It is noted that the Employer allegedly had no knowledge of Petitioner's letter until subsequent to the election. I have carefully considered this letter and I find that it does not materially differ from Exhibit A, in pertinent part, and accordingly, they will be considered together, *infra.*

[22] These meetings are enumerated in fn. 8, *supra.*

With regard to the Employer's wage structure for unit employees, the investigation revealed that effective August 1, 1974, the Employer instituted a new wage program as a result of an industrial engineering analysis which established job descriptions and salary ratings. As a consequence, of approximately 155 unit employees, 104 had no wage change (67%), 36 received wage-rate increases (23%) and 15 wage-rate cuts (10%). In these circumstances, it is clear that Petitioner's leaflet and letter are in error when they state that "most" employees received wage cuts in August.

In deciding cases where objections to an election have been filed alleging that one party misrepresented certain facts, the Board balances the right of employees to an untrammeled choice and the right of the parties to wage a free and vigorous campaign with all the legitimate tools of electioneering. In striking this balance, the Board has promulgated the following rule—

> But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, the misrepresentation might have occurred in connection with an unimportant matter so that it could only have had a *de minimus* effect. Or, it could have been so extreme as to put the employees on notice of its lack of truth under the particular circumstances so that they could not reasonably have relied on the assertion. Or, the Board may find that the employees possessed independent knowledge with which to evaluate the statements.[23]

It is well settled that mere falsity does not alone constitute campaign trickery which warrants setting aside an election. It is only where one of the parties deliberately misstates material facts which are within its special knowledge and where the employees are unable properly to evaluate the misstatements, that the Board will set the election aside.[24] Applying these principles to the instant case, it is clear that the misstatement regarding wage cuts was not within the special knowledge of the Petitioner. Indeed, it is likely that the employees had as much information as Petitioner with respect to the Employer's institution of a new wage-rate structure. Moreover, by its own admission, the Employer had at least 30 hours prior to the election to respond to Petitioner's leaflet, but chose not to avail itself of the opportunity.[25] In these circumstances, I find that the statements were not so misleading as to prevent the exercise of a free choice by the Employees or that the statements had a real impact on the election.[26]

With respect to the Employer's second contention herein that Petitioner's leaflet materially misrepresented the eligibility of certain allegedly terminated employees, I have

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[23] *Hollywood Ceramics Company, Inc.*, 140 NLRB 221.

[24] *Modine Manufacturing Company*, 203 NLRB No. 77; *Uniroyal, Inc.*, 169 NLRB 918; *Hollywood Ceramics Company, Inc., supra; The Cross Company*, 123 NLRB 1503.

[25] *Modine Manufacturing Company, supra.*

[26] *Modine Manufacturing Company, supra; Uniroyal, Inc., supra; Hollywood Ceramics Company, Inc., supra; The Cross Company, supra; Craft Manufacturing Co.*, 122 NLRB 341.

carefully considered the contents of Exhibit A in its entirety and I find that there is no reference therein to the eligibility of terminated employees. I thus find that there is no evidence to support this contention.[27]

With respect to the Employer's third contention herein that Petitioner's leaflet was false and misleading when it stated, in bold print, that Petitioner's attorneys had verified it, I find no merit to this assertion. I have carefully considered the contents of Exhibit A in its entirety and find that it is not misleading. Therefore, I find that the leaflet did not interfere with the free choice of the employees.[28]

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[27] In this connection, although not raised as an objection to the election, the investigation disclosed that the Employer, on or about Noven ber 22, 1974, timely submitted a voter eligibility list containing 145 names. Thereafter, by letter dated December 2, 1974, the Employer submitted a list of 42 individuals whose names appeared on the list originally submitted and claimed that they had been "laid off for an indefinite period." The Employer, in a telephone conversation with a Board Agent prior to the election, contended that these 42 employees were ineligible to vote, however, their names were not deleted from the voter eligibility list herein. The investigation further revealed that 21 of the 42 individuals, contained on the Employer's list of laid-off employees, voted and that the Employer's observers challenged 4 of them. In these circumstances, it is clear that even if the remaining 17 voters, who voted without challenge, had all cast their ballots for Petitioner, it would not have affected the outcome of the election as the tally of ballots indicated that of approximately 115 valid ballots cast, 72 were cast for the Petitioner, 1 was cast for the Intervenor, 42 were cast against the participating labor organizations and 7 ballots were challenged. Moreover, it is noted that the Employer had the opportunity to challenge all 21 of the laid-off individuals but declined to do so. See *Oppenheim Collins & Co.*, 108 NLRB 1257.

[28] *Decorated Products, Inc.*, 140 NLRB 1383, 1385; *Modine Manufacturing Company, supra; Hollywood Ceramics Company, Inc., supra.*

With respect to Petitioner's oral statements regarding attorney fees and sympathy strikes assessments, which the Employer asserts are misstatements, the Employer has furnished no evidence that these statements are untrue. Petitioner's representative, Primo Benale, admits to stating "the company is spending a lot of money to keep the union out, like most companies will do." Moreover, the investigation revealed that the Petitioner has never assessed its members for the purpose of supporting a sympathy strike. In these circumstances, even assuming *arguendo* that Petitioner's statements are untrue, I find that they do not constitute grounds for setting aside the election. The Board, recognizing that parties in election campaigns often overstate their own virtues and the vices of others, has consistently held that exaggerations, inaccuracies and half-truths, although not condoned, will not be grounds for setting aside elections, provided that the statements are not so misleading as to prevent the exercise of a free choice by the employees in the selection of a bargaining representative.[29]

Based upon the foregoing, I find that Objection No. 3 does not raise substantial or material issues with respect to conduct affecting the results of the election. Accordingly, Objection No. 3 is overruled.

OBJECTION No. 4

The Employer asserts herein that the Petitioner interfered with the election by engaging in electioneering in and about the polling area on the day of the election.[30]

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[29] *Modine Manufacturing Company, supra; Hollywood Ceramics Company, Inc., supra.*

[30] The election was held on December 11, 1974 between the hours of 2:30 p.m. to 4:30 p.m. in the cafeteria located on the Employer's premises.

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The Employer specifically alleges that on the day of the election at approximately 2 p.m., his representative escorted the Board Agents and representatives of the Intervenor and the Petitioner to the polling area located within the cafeteria.[31] The Employer's representative stated, in an affidavit, that while the Board Agents were engaged in the process of setting up and arranging the polling area for the conduct of the election, Petitioner's representative, Primo Benale, initiated conversations with several groups of employees who were "milling about" the cafeteria.[32] The Employer submitted no evidence with respect to the content of these conversations. Benale, in an affidavit, admits to speaking to several employees, including Petitioner's observers, at various times during the approximately 30 minutes prior to the opening of the polls. However, he denies initiating these conversations which apparently dealt with the election process.

The Employer's representative further alleged that at approximately 2:20 p.m., Benale spoke to him in a loud voice, saying that a certain employee had been told by her supervisor that she would not be allowed to vote, and that "we'd better do something about it." The investigation revealed that the situation was defused when the Employer's representative stated, *inter alia*, that all who desired to vote could do so. Benale does not dispute this incident, although

[31] The cafeteria is approximately 100′ × 100′. The polling area itself, an open area of approximately 10′ × 15′, was located in the right-hand side of the cafeteria.

[32] The total number of employees present in the cafeteria prior to the opening of the polls at 2:30 p.m., ranged from approximately 10 to 20. It appears that some of these individuals were on coffee breaks whereas others were former employees (laid-off) waiting for the polls to open.

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he denies using a loud voice. It is uncontradicted that this incident occurred prior to the opening of the polls at 2:30 p.m.

The Employer submitted no evidence, nor did the investigation reveal any electioneering during the time that the polls were actually open.

It is well settled that sustained conversation with prospective voters waiting to cast their ballots regardless of the content of the remarks exchanged constitutes conduct which, in itself, necessitates a second election.[33] However, in the circumstances of the instant case, accepting *arguendo*, the Employer's version of the facts, it is clear that the electioneering alleged, was not addressed to voters "in line" waiting to vote. Rather, the alleged electioneering was directed at individuals "milling about" the cafeteria, in the vicinity of the polling area. Furthermore, it is clear that the conversations between Petitioner's representative and prospective voters took place within the half hour prior to the opening of the polls. It has neither been alleged nor did the investigation reveal that any electioneering took place during the period of time in which the polls were officially open. In these circumstances, it is clear that the *Milchem* doctrine is not applicable as voters were not waiting in line to vote nor were the polls open when the alleged electioneering occurred.[34]

Based on the foregoing, I find that Objection No. 4 raises no substantial or material issues with respect to conduct affecting the results of the election. Accordingly, Objection No. 4 is overruled.

[33] *Milchem Inc.*, 170 NLRB 362; *Harold W. Moore & Son*, 173 NLRB 1258.

[34] *Lincoln Land Moving & Storage, Inc.*, 197 NLRB 1238.

OBJECTION No. 5

The Employer asserts herein that Primo Benale, Petitioner's Representative[35] deceived employees at a union campaign meeting conducted on December 10, 1974, by not informing them of his changed status with Petitioner, thereby causing employees to believe that campaign promises made by him would still be fulfilled.[36]

In support of its objection, the Employer proffered two employee witnesses[37] who stated, in affidavits, that at the December meeting, Benale, in response to a question, denied losing his job with Petitioner. In their initial affidavits, supplied by the Employer, they stated that this denial led them to believe that promises made by Benale during the electoral campaign would be fulfilled and that Benale would represent the Petitioner in any subsequent collective bargaining negotiations with the Employer.

The investigation revealed that on or about November 10, 1974, Benale was defeated for the office of President of Petitioner in an internal union election. The investigation further revealed that Benale's term of office as Petitioner's Recording Secretary expired on December 31, 1974, at which time he assumed the position of Petitioner's organizer.

In the circumstances herein, accepting *arguendo*, the Employer's version of the facts, I find no misrepresentation or deception on Petitioner's part. In this connection,

[35] Benale's status with Petitioner will be discussed, infra.

[36] The December 10, 1974 meeting herein is one of the four union campaign meetings conducted by Petitioner as discussed in fn. 8, *supra*.

[37] It is noted that the two witnesses herein are the same individuals proffered by the Employer in support of Objection Nos. 1 and 2.

it is clear that at the time of the incident, December 10, 1974, Benale was Petitioner's Recording Secretary and when his term of office expired on December 31, 1974, he became Petitioner's organizer. As there is no evidence of a break in Benale's employment with Petitioner during the relevant and material period of time herein, and noting that his denial of loss of employment with Petitioner was a factually accurate statement, I find that Objection No. 5 raises no substantial or material issues with respect to conduct affecting the results of the election.[38] Accordingly, Objection No. 5 is overruled.

OBJECTION No. 6

The Employer contends herein that the election should be set aside on the grounds that there was insufficient time in which to overcome a plant rumor to the effect that the Employer was responsible for an error involving the replacement of official Board Notices of Election with amended Notices.

The investigation revealed that copies of official Board Notices of Election, in connection with the election herein, were mailed to the Employer on November 29, 1974. In the original Notice of Election, the Petitioner's name appeared on the left hand side of the sample ballot whereas the Intervenor's name appeared on the right hand side, contrary to the agreement of the parties. When this error came to the attention of the regional office, amended Notices, correcting the error, were mailed to the Employer on December 3, 1974, and the Employer was directed to remove the

[38] *Hollywood Ceramics Company, Inc., supra.*

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original Notices and replace them with the amended Notices.[39] The Employer does not contend nor did the investigation reveal that employees did not receive adequate notice of the time, date and place of the election.

With respect to the existence of an alleged rumor to the effect that the Employer was responsible for the error, I find, even assuming *arguendo* the existence of such a rumor, that it does not afford adequate grounds for setting aside the election. In this conection, the Employer had ample opportunity to reply to the rumor, and, admittedly, did so. There was no claim that the Petitioner originated, authorized, or approved the circulation of the rumor. Further, there is no claim nor did the investigation reveal any unawareness among employees of the time, date and place of the election. In these circumstances, the existence of the alleged rumor does not afford adequate ground for setting aside the election.[40]

Based on the foregoing, I find that Objection No. 6 does not raise substantial or material issues with respect to conduct affecting the results of the election. Accordingly, Objection No. 6 is overruled.

Having overruled the Employer's Objections in their entirety and as the Petitioner has received a majority of the valid votes cast in the election, I shall issue the following certification:

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[39] It is noted that the Employer fully complied with this direction.

[40] *Alladin Plastics, Inc.*, 182 NLRB 64; *West Texas Utilities Company*, 200 NLRB 1012.

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

CERTIFICATION OF REPRESENTATIVE[41]

IT IS HEREBY CERTIFIED that Local 177, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, has been selected by a majority of the employees of the above-named Employer in the unit herein involved as their representative for the purposes of collective bargaining and that pursuant to Section 9(a) of the Act, as amended, the said labor organization is the exclusive representative of all employees in such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

ARTHUR EISENBERG
Arthur Eisenberg, Regional Director
National Labor Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

Dated at Newark, New Jersey
this 22nd day of April, 1975.

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[41] Under the provisions of Section 102.69 and 102.67 of the Board's Rules and Regulations, a request for review of this Supplemental Decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by May 3, 1975.

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

EXHIBIT "A"

DEPARTMENT STORE DRIVERS, WAREHOUSEMEN AND HELPERS
LOCAL UNION NO. 177

To Employees of N.B.C.

In the past week, the Company in its messages to you, has stressed its concern for you, but at the same time you should keep their past performances in mind, such as back in the month of August when most employees took a "wage-cut".

WHERE WAS THAT CONCERN AT THAT TIME ? ? ?

Enclosed copy will show that executives of N.B.C. did not. This would not have happened if you were protected by a written Teamster contract.

Company management in its own sly way claims that you will have to pay dues to be associated with Local #177. The history of unionism is that the small investment of dues is returned in far greater benefits, both in wages, in working conditions and future security.

REMEMBER—THERE IS ABSOLUTELY NO INITIATION FEE—
EVEN IF YOU ARE NOW LAID-OFF, AS YOU ARE STILL
CONSIDERED PART OF A NEWLY-FORMED GROUP.
ARE YOU ELIGIBLE TO VOTE?

YES

or your name would not have been placed on the eligibility list sent out by the N.L.R.B. and you would not be receiving this letter and as I also stated on the sample ballot posted at N.B.C., the voting unit shall consist of all employees on the payroll period ending November 3, 1974.

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

THIS IS ALSO VERIFIED BY OUR ATTORNEYS.

THEREFORE, I urge you on behalf of your co-workers, who have shown great concern to be there to vote on Wednesday, December 11, 1974, from 2:30 P.M. to 4:30 P.M., so they will have a voice, concerning their WAGES and also yours, plus BENEFITS—WORKING CONDITIONS—PENSIONS—ETC.

We ask you to be present on Tuesday, December 10, 1974 at the Anchor Casino, at 3:30 P.M., so we may answer any questions that you have pertaining to the National Labor Relations Board election on December 11, 1974.

We ask you to keep these facts in mind when you cast your ballot on Wednesday, December 11th. We honestly feel Local #177 is the best choice for you and your co-workers. Vote for Local #177 as if your livelihood depends on it. IT DOES.

Sincerely,

LOCAL UNION NO. 177
PRIMO BENALE
Recording Secretary and Organizer

VOTE TEAMSTERS AND YOU WILL ALWAYS BE RIGHT!!!

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

1973 WAGES—SALARY

(Give 5% to 10% increase in salary for 1974)

Employee #	*Name*	*Semi-Monthly*
100120	Palkow	$ 583.34
100201	White	687.50
100214	Barrowclough	527.50
100311	Hyers Sr.	588.25
100324	Hoekstra Jr.	716.67
100405	Haura	854.17
100502	Ames	650.00
100612	Schwit	1,125.00
101019	Fleichner	854.10
101103	Heller	566.25
101417	Oberti	634.38
101401	Van Houwe	583.00
101611	Wanke	688.00
101624	Pezzuitti	583.00
101718	Hammes	604.17
101828	MacDonald	883.34
101925	Whitten	799.50
102021	Mars	525.00
103415	Deinzer	1,666.00
103428	Gogolen	458.00
100227	Rodshon	466.67
	Yuppa	458.00

N.B.C. HAS THE NERVE TO:

1. CUT HOURLY WAGES!!!!
2. FREEZE HOURLY WAGES!!!!
3. AFTER 18 MONTHS A PENNY RAISE!!!!

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

EXHIBIT "B"

DEPARTMENT STORE DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 177

November 29, 1974

TO THE EMPLOYEES OF N.B.C.

During the next couple of weeks you will receive information from both Union and the Company relative to the Collective Bargaining election in which you are eligible to cast a ballot on WEDNESDAY, DECEMBER 11, 1974, in the cafeteria of N.B.C.

The decision is yours to make, but we strongly feel that the one measure of difference has to be the permanent security of you and your family.

Just keep in mind the wage cuts that most of the employees were forced to take back in the early part of August, and what guarantee do you have that this can't happen again unless you vote YES on WEDNESDAY, DECEMBER 11, 1974, whereby you will have a WRITTEN CONTRACT which will spell out permanently your guaranteed wages, your guaranteed working conditions, your guaranteed benefits and pension.

Moreover your association with Teamsters Local 177 will mean a stronger and more knowledgeable collective bargaining team which will represent you in getting not just crumbs offered by management, but the fair amount of pay and other fringe benefits which are your right.

Our Union is run by the membership. You will select your own shop stewards and you and your co-workers will draw up proposals and vote on demands and a contract. Local 177, backed by the International Teamsters Union will provide the negotiators and the analysts who will help you to draw up and sustain your rightful demands.

Regional Director's Supplemental Decision and Certification of Representative and Attachments, Dated April 22, 1975

We ask you to be present on TUESDAY, DECEMBER 3, 1974, at the Anchor Casino, at 3:30 p.m. so we may answer any questions that you have pertaining to the National Labor Relations Board election on December 11, 1974.

PRIMO BENALE
Recording Secretary & Organizer

N.L.R.B.'s Teletype Denying Petitioner's Request for Review of the Supplemental Decision and Certification of Representative, Dated June 25, 1975

(FORM OF TELETYPE)

AXK PLS
NLRB GO AHD PLS
GSA RO NY GA
NY 031 JUNE 25
UIHHZ RUEVDEL0015 1742105—0000—RUEVDAE.
NLRB
FM MARIO LAUOR JR ASST EXEC SECY NLRB
WSH DC
TO RUEVDAE/5/PETER STERGIOS ESQ SHEA
GOULD CLIMENKO AND KRAMER 330 MADISON
AVE NY NY
TO RUEVDAE/5/WILLIAM TANIS DISTRICT 15
INTL ASSOC OF MACHINISTS 1133 MAIN ST
PATTERSON NJ
TO RUEVDAE/5/VICTOR PARSONNET ESQ
PARSONNET PARSONNET AND DUGGAN
10 COMMERCE COURT NEWARK NJ
TO RUEVDAE/5/WILLIAM CRIVELLI ASSOCIATES
774 BROAD ST NEWARK NJ
TO RUEVDAE/5/NLRB REG 22 NEWARK NJ
ST
RE NATIONAL BERYLLIA CORPORATION 22 RC
6172 EMPLOYER'S REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S SUPPLEMENTAL
DECISION
AND CERTIFICATION OF REPRESENTATIVE IS
HEREBY DENIED AS IT RAISES
NO SUBSTANTIAL ISSUES WARRANTING
REVIEW. BY DIRECTION OF THE BOARD:

BT

NNN000

ONE MSG RECD OK—FAF RECD 11:15

N.L.R.B.'s Telegram Denying Respondent's Motion for Reconsideration, Dated July 21, 1975

(FORM OF TELEGRAM)

NKC 015(0838) (1-00358 1C 202)PD 07/21/75 0836
TWX GSA RO NY GA
005 NEW YORK NY JULY 21
PMS VICTOR PARSONNET ESQ
PARSONNET PARSONNET AND DUGGAN
10 COMMERCE COURT
NEWARK NJ
RE: NATIONAL BERYLLIA CORPORATION, 22-4C-6172. EMPLOYER'S MOTION FOR RECONSIDERATION OF BOARD'S DENIAL OF ITS REQUEST FOR REVIEW IS HEREBY DENIED AS IT CONTAINS NOTHING NOT PREVIOUSLY CONSIDERED. BY DIRECTION OF THE BOARD:
ROBERT VOLGER DEP EXEC SECTY
NATIONAL LABOR RELATIONS BOARD
ORDER SECT
WASH DC